

# Bhutan workshop on legislative and regulatory drafting (23 August - 3 September, 1999)

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*Boston University*

August 18, 1999

OUTLINE FOR TWO WEEK WORKSHOP  
Thimphu, 1999

**DAY I: TRANSLATING POLICY INTO EFFECTIVE LAW**

Morning session:

**I. 10:00 - 12:00 Purpose and structure of workshop: (Prof. Robert B. Seidman)**

**A. Objectives:**

1. draft bills and research reports
2. learn legislative theory and methodology

**B. Teaching method: learning-by-doing in small groups**

1. discuss issues of theory and practice
2. prepare bills and reports

**C. Plenary discussion:** "Nobody fixes something unless they think it is broken. Legislation always addresses a social problem." Discuss.

**1. Small groups: Discuss:** (45 minutes)

a. What do you understand by 'social problem'?

b. Describe how the social problem that your group's bill and research report will address presently appears to you?

**II. In aid of social, political and economic development, what constitutes the drafter's task?**

**A. Introduction: Plenary discussion: (Prof. Robert Martineau)**

1. In Bhutan today, who writes the final draft of most bills? How do they go about their task?

2. In connection with proposed legislation, what do most civil servants in the line ministries consider as their primary task?

3. This workshop adopts the approach that drafters should include both **ministry officials** -- who know the facts about the social problems bills aim to solve --

and **legally-trained drafters** -- who know legislative drafting techniques. These must work together to **ensure the unity of the bill's form and substance in translating policy into effectively implementable law.**

*Read Manual, Chapters 1-3*

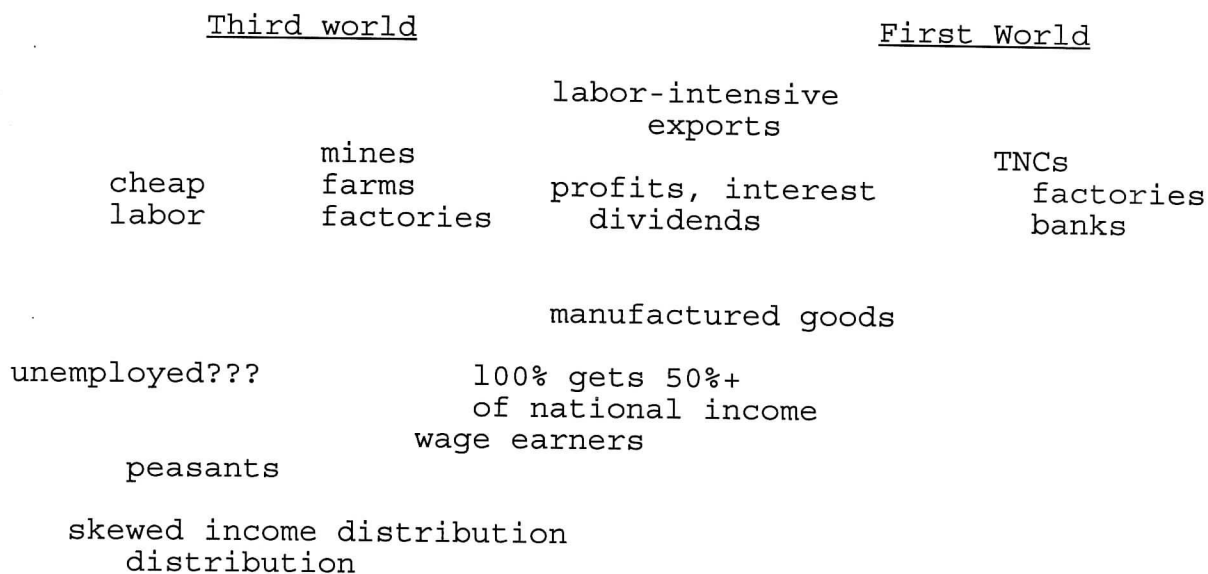
B. Development in the larger context; development and institutions: Four categories of priority issues for development. (Prof. Ann Seidman)

1. *Economic development*

a. Consider the model in Fig. 1

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**Fig. 1: Model of Third World Dependency**



(belongs in Manual, Chapter 3, p. 9).

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b. Considered as a model of resource allocation, does the model generally describe Bhutan's circumstances? What special Bhutanese circumstances exist that require some modification of the model?

c. Can government do anything *directly* about resource allocations?

d. 'The model of resource allocation and dependency also constitutes a model of

*institutions and their relationships.* Discuss.

e. 'The difference between one society and another, or between a less developed and a more developed society, lies in their institutional differences.' Discuss.

2. 'Efficiency' and 'equity': The vocabulary of human rights in development as a movement to consider not only efficiency but also distributive consequences of development initiatives.

3. 'Effective governance': Ineffective development programs as social problems.

a. Government has earlier addressed almost every social problem that one can identify. The 'social problem' as it appears to the drafters almost invariably includes the failure of past efforts at solution.

4. 'Good governance': Arbitrary decision-making as social problems. In this connection, the 'social problem' as it appears almost everywhere includes repeated arbitrary decision-making -- especially, corruption and the overhanging threat of corruption.

#### 5. Small groups

a. Give one example in Bhutan of each of these social problems.

Afternoon session:

#### C. Institutions and behavior: Plenary discussion. (Professor Robert Seidman)

1. What do you understand by the word 'institution'? Give some examples.

2. What do you understand by the word 'development'? Give some examples of a more developed and of a developing society, and describe the key differences

3. Consider an institution as *repetitive social behaviors*? In that interpretation, is the judiciary an institution? the legislature Why? Is your department or ministry an institution? Why? Is the family an institution? Is this course an institution?



4. 'The processes of development require *institutional changes* to resolve the poverty and dependency that presently characterize the poor nations, and their ineffective and poor governance.' Discuss.

5. 'The processes of development require widespread changes in repetitive patterns of behavior.' Discuss.

D. Government, law and institutional change.

1. **Plenary discussion:** The many functions of law.

a. Law has many functions, for example: Dispute settlement, the authoritative declaration of rights and duties, supporting the power and privilege of the ruling class, articulating deeply held social values, channelling various social behaviors into desired ways.

b. For purposes of social, political and economic development, which of these many functions of law seem to you the most important? Why?

E. Social problems consist of problematic sets of behaviors, that is, of problematic *institutions*.

1. **Plenary discussion:**

a. Consider the social problem that you have identified as the target of your proposed bill. Did you initially describe it as a resource allocation or as a behavioural problem? Can you describe it as a problem in resource allocation?

b. Describe it as a behavioral problem.

c. Can one describe every social problem as a behavioral problem?

F. The legal order as government's principal tool for social change, i.e., for addressing social problems.

1. **Plenary discussion:**

a. Is it true that Government invariably translates a seriously intended, publicly avowed policies as a law? Any exceptions?

b. Why does government do that? Why not merely announce the policy?

## G. The role of the drafters.

1. In this workshop, the word 'drafters' refers to both line ministry officials concerned with getting legislation drafted, and the lawyers who write the technically-finished draft bills. Those two groups should join in producing a finished bill for presentation to the legislature. Together, they constitute the *drafters*.

### 2. Two views of the drafter's role:

a. The drafter as *communicator of someone else's policy*, and therefore as disinterested in the bill's substance.

(1) This view of drafter long inculcated by British tradition.

(a) Practically all drafting courses focus on training drafters to draft unambiguous, well-written bills to communicate law to its addressees.

(b) That reflects an all but universal myth that drafters have nothing to do with the *substance* of legislation, but only its *form*.

(c) Myth's history: In 19th Century England, in the face of ministries' objections to the establishment of the central drafting office (and the ministries' seeming loss of control over their own bills), the new head of the drafting office insisted it would never change the ministries' bills' substance, but only improve their form.

b. The drafter as *translator* of policy into law, and therefore an active participant in developing the bill's substance.

### 3. Plenary discussion:

a. Why should drafters include both line ministry officials and those who draft the technical form of the final bill?

b. What constitutes the principal function of the law and the legal order in development?

c. What constitutes the principal function of drafters in development? Does your view of the unity of form and substance in drafting, or their relative disunity, affect your answer to that question?

d. What role in fact do drafters play in the bill-creating process?

### III. How law affects behaviors (Prof. Robert Seidman)

#### A. Recapitulation

1. Social problems all but invariably consist of ensembles of problematic behaviors.

2. Government 'policies' invariably expressly or by necessary implication address social problems (nobody fixes something that does not need fixing).

3. All seriously intended, publicly-avowed governmental policies sooner or later appear as a law or regulation.

4. *In development, drafters have a principal function of writing laws and regulations that actually induce behaviors likely to alleviate the identified social problem.*

B. **Plenary discussion:** The critical question that a drafter must answer is, 'Why do people behave as they do in the face of a rule of law?' Do you agree with that statement?

C. Why do people behave as they do in the face of a rule of law?

#### 1. Plenary discussion:

a. Consider the following two cases:

(1) A small side street intersects with a busy main highway (for example, Thimphu's main street), with an average highway speed of 100 km per hour. A stop sign exists on the side street at its intersection with the highway. From the side street, a motorist has easy visibility up and down the main street. You observe that most cars stop at

the intersection; a few slow down but do not come to a stop, especially in the small hours of the morning when there is very little traffic on the highway and what there is can be seen for a long distance because of the loom of the cars' headlights. In the daytime during the rush hours, a policeman is on point duty at the intersection, controlling traffic. To what extent does the law explain the behavior of the drivers at the intersection?

(2) One year ago, on January 15, Newstate's new income tax law came into force. Its Income Tax Department came in to existence at the same time. The law requires individuals and companies to self-report their income on forms provided by the Department for that purpose. The forms are due on January 15. By January 20 of the current year, only some 47% of taxpayers appear to have filed forms. To what extent does the law explain their behaviour?

2. Why people behave as they do in the face of a rule of law constitutes a central problematic for the discipline of sociology of law. For drafters, sociology of law becomes a *professional* subject.

a. The Norwegian anthropologist Karl Barth held that the simplest model of society consisted of individuals and collectivities (for example, corporations, ministries) making choices within the limited range of choices permitted by the circumstances, and within the constraints and resources imposed by those circumstances.

b. That theory underpins the model (This Figure 1-1 belongs in Manual, ch.1, p. 17)

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**Fig. 1-1: A MODEL RELATING LAW TO THE BEHAVIOR**

OF ITS

# ADDRESSEES

time- and place-specific  
circumstances

law makers

rule

rule

implementing  
agency (secondary  
role occupants)

sanctions

primary role  
occupant

time- and place-  
specific  
circumstances

time- and place-  
specific  
circumstances

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## 3. The model described

- a. Given that, as a principal function, law aims to channel behaviors to solve social problems, does it make sense to say, "It is a good law but badly implemented?"

## 4. The uses of the model as *an inspiration for explanatory hypotheses (or 'educated guesses')*

### a. Plenary discussion:

(1) Consider the behavior of motorists at the intersection of a side street and a main highway. Based on the model before us, what hypotheses would you put forward as explaining the behaviour of motorists at that intersection?

(2) In general, what categories of factors does the model advise the drafter to consider in explaining problematic behaviors?

## 5. The uses of the model as a guide to drafting new laws.

(1) Consider the behaviour of taxpayers in the face of Newstate's new income tax law. Based on the model, what hypotheses would you put forward to explain the behaviour of the

delinquent taxpayers? What proposals would you put forward to increase the number of reporting taxpayers?

(2) In general, what categories of factors does the model advise the drafter to consider in devising new, *effective* legislation?

(3) The world around, to devise a new law, most commonly drafters copy the law from some other jurisdiction (in the developing world, most commonly the law of a 'developed' country). Does the model teach us anything about the advisability of copying law?

## DAY II: JUSTIFYING A BILL: THE RESEARCH REPORT

Morning session:

### IV. The purpose and structure of the research report: (Prof. Ann Seidman)

Read: **Manual, ch. 4, pp 1-7**

A. The functions of a research report: as a --

1. *justification* for a bill;
2. *guide to decision-making*;
3. *device to inform decision-makers* about the factual basis for the bill

B. Decision-making methodology and the structure of the research report: In general.

1. Various methods by which drafters elsewhere (including both line officials and drafters in the central drafting office) decide on the substance of a bill in light of a given policy, briefly described:

- a. Copying law
- b. Criminalizing behaviour
- c. Compromise between claims and demands of competing interest groups.
- d. Ends-means
- e. Incrementalism
- f. Problem-solving's four steps:
  - (1) Social problem addressed (or 'difficulty')
  - (2) Explanations
  - (3) Solution (the bill)
  - (4) Implementation and monitoring.

C. **Plenary discussion:** To what extent, from time to time, have drafters of Bhutanese legislation used any or some or all of these methodologies for designing new bills?

D. **Small groups:** The Minister asks you to prepare instructions for a drafting team to draft the bill with which your group is concerned. Write those instructions in three ways: As if you followed --

1. an ends-means approach;
2. an incrementalist approach; and
3. a problem-solving approach.

E. The detailed outline of a research report using the problem-solving methodology as the basis for decision-making:

1. The outline for the research report follows the logic of legislative theory: *The explanation of causes of behaviours lays the basis for proposed detailed measures in bill (i.e., solutions)*

Read **Manual**, Chapter IV, pp. 35-39

## V. The Introduction to the research report

### A. The functions of the Introduction

1. To locate the reader in the subject-matter of the research report.
2. In particular, to locate the particular social problem addressed in the general agenda concerning development.

### B. **Small groups:**

1. What general program does the line ministry have to address the sector concerned?
2. Where does the particular social problem at hand fit into that program?
3. Can you justify the selection of your bill for priority in drafting in terms of human rights to development, sustainable human development, effective governance and/or the need for non-arbitrary decision-making?

Afternoon session:

**VI. Describing the difficulty: (Prof. Robert B. Seidman)**

A. The detailed analysis of the difficulty as the foundation of the research report and the bill.

1. 'Unpacking' problematic social behaviors in to their different sets and groupings.

B. **Small groups:** Using the checklist for a research report, write the 'difficulty' section of your research report. (First discuss in group, then assign each group member the task of outlining a part of the 'difficulty' section).

- [1. For the moment, exclude the mini-introduction and mini-conclusions; we will discuss those later]
2. Describe facts relating to:
  - a. the difficulty's superficial manifestation;
  - b. whose and what behaviors seems problematic.
  - c. [Provide the facts, based on whatever knowledge you now have (If time and resources permit, the hypotheses you now formulate on the basis of your current knowledge can guide you in gathering further facts. Otherwise, like most bills, yours will rest on the information you *presently* have available. Never fear: The line ministries usually have a great deal of information about the problems for which they propose to draft a bill.)]

C. Three preliminary choices:

1. The scope of the bill; avoid 'stuffing' the bill.
2. In problem-solving, the function of the history of the problem and previous Bhutanese attempts to solve it, and its appropriate location in the research report.
3. In problem-solving, the function of foreign law and experience, and its location in the research report;.

**DAY III: EXPLAINING CAUSES OF PROBLEMATIC BEHAVIOURS**

VII. Legislative theory's research agenda for explaining role occupants' behaviours: The ROCCIPI research agenda **Manual, Ch.**



## 4, pp.12-20)

A. The second step of the problem-solving agenda (stated above): 'Formulate explanatory hypotheses (educated guesses) as to causes for role occupants' behaviors (including existing implementation agencies)'

1. The ROCCIPI categories, broadly construed, suggest possible hypotheses to explain the interrelated causes of a role occupant's behaviours in the face of a rule of law.

a. They direct attention at both 'legal' and 'non-legal' causes for behavior.

2. **Small groups:**

a. For your bill, insofar as you now can, use ROCCIPI agenda to complete the section of the outline (**Manual, Box 4-5, pp. 35-9**) relating to explanations of an important primary role occupant's problematic behaviours.

(1) Write out your 'educated guesses' as to causes (be sure to distinguish between **causes** and **conditions**).

(2) Include whatever facts you have that show your 'guesses' appear consistent with the evidence (be sure to assess the available facts; see **Manual, Ch. 6**).

B. Explaining implementing agency behavior.

1. Implementation is central issue relating to use of law for social change: **Manual, Ch. 5**

a. The ROCCIPI categories that help develop hypotheses to explain primary role occupant's behaviors serve the same function with respect to explaining implementing agencies' behaviors (**Manual, Ch. 5-pp. 5-23**).

2. Issues of special importance in explaining implementing agency behaviors

a. Because implementing agencies always comprise complex organizations, an additional model helps to generate hypotheses to explain the *processes* within which agency role occupants decide how to

behave (see **Figure 5-1, Manual, Ch. 5, p. 11**).

b. Whether the agency is primarily *proactive* or *reactive* frequently explains its Capacity to implement the law.

c. The system of *appeals* from agency decision, and the *transparency of its decision-making* frequently determine its *accountability* and therefore the relatively arbitrary character of its decisions.

### 3. **Small groups:**

a. Each group member should take 15 minutes to write down the factors (including available supporting facts) that he or she can think of under **one ROCCIPI category** as to causes of officials' problematic behaviours that under existing law seem to hinder effective implementation.

b. Group as whole should review members' explanations, and, *considering all the facts they know and the interrelated impact of the several causes*, revise and strengthen their explanations for the implementing agency's problematic behaviours (Note points at which getting more facts might prove useful; see **Manual, Ch. 6**).

c. Assess the available facts' utility for the validity of your combined explanations.

d. What questions would you ask about foreign law and experience to obtain a better understanding about possible causes of problematic implementation behaviors?

## **DAY IV: FORMULATING LEGISLATIVE SOLUTIONS (THE BILL'S DETAILED MEASURES)**

VIII. The problem-solving methodology's basic logic teaches that *a bill's detailed provisions should address each cause for the problematic behaviours that constitute the social problem that the bill addresses.* (Review **Manual, Chapters 4,5**).

A. Possible alteernative 'solutions': Proposing detailed

alternative measures for your bills.

1. Where derived:

- a. Foreign law and experience;
- b. professional literature;
- c. Bhutanese experience;
- d. own ideas.

B. Choosing between alternatives

1. List possible alternative solutions (i.e, the detailed measures) for your bill.

2. Review causes for role occupants' problematic behaviours;

3. list measures of for overcoming causes of primary role occupants' behaviours:

- a. Direct measures (rewards and punishments)
- b. Roundabout measures (to change factors that cause problematic behaviors;
- c. Educative measures (to change values and attitudes).

4. List measures to overcome causes of the implementing agency's problematic behaviours.

a. Alternative forms of the implementing agency.

(1) In general

- (a) Transitive or intransitive agency;
- (b) Old or new agency;
- (c) Proactive or reactive.

(2) The form of the agency

- (a) Implementation through dispute settlement;
- (b) bureaucratic implementation (usually, a ministry);
- (c) implementation by a public corporation' or
- (d) implementation through the private sector

5. Small groups:

a. Using the ROCCIPI agenda and the complex decision-making model, outline the solution section of your research report with respect to the proposed implementing agency's input-, conversion-, or feedback processes.

b. Testing your proposed solution:

(1) Do proposed measures seem to address the identified causes? Will they likely induce the prescribed behaviors? ('ROCCIPI in reverse')

(2) What provisions concerning the implementing agency seem likely to ensure more effective implementation?

(3) What questions would you ask about foreign law and experience as to whether your proposed measures seem likely to work?

c. Outline the sections of the research report concerning the proposed solution (see Outline in the *Manual*)

C. Make a social cost/benefit analysis of all the alternative possible solutions (measures addressed to primary role occupants and to implementing agencies) as a basis for selecting your group's preferred solution (see *Manual*, Ch. 4, pp. 20-7)

**1. Small groups:** Outline socio-economic costs and benefits of your bill's proposed measures:

a. List monetary costs and benefits to:

(1) Stakeholders (that is, everyone affected by the bill)

(2) Government

2. List social consequences for:

a. Sustainable development

b. Vulnerable groups (women, children, aged, poor, ethnic minorities);

c. Inchoate values (human rights, environment, good governance).

D. Devices to avoid arbitrary decision-making and corrupt

behaviours

**1. Small groups:**

a. Assess proposed implementing agency's criteria and procedures in terms of the following:

(1) Do they sufficiently limit officials' discretion, and provide transparency, and accountability?

(2) do they ensure that those affected (especially historically-disadvantaged groups) participate as much as possible in input-, feedback- and conversion-processes?

b. What questions might you ask about foreign law and experience to learn of possible ways to improve implementing agency's criteria and procedures for decision-making?

c. To reduce dangers of arbitrary decision-making and corrupt behaviours, what would the group recommend about possible changes in the research report's solutions section

**DAY V: SOCIAL SCIENCE RESEARCH METHODS FOR DRAFTERS**

**Read Manual, Ch. 6**

IX. To justify the claim that your bill's proposed measures rest on reason **informed by experience**, you must be sure that your hypotheses (educated guesses) as to the nature and causes of the difficulty and the problematic behaviors that comprise it prove **consistent with sufficient evidence** to make it likely that your proposed solutions, designed to overcome those causes, will lead to the desired social consequences

**A. Small groups:**

1. Identify the kinds of facts, and where you obtained them, that you have used in your research report to:

a. To describe the social problem and the behaviours that comprise it;

b. To support your claims as to the causes of the problematic behaviours;

c. To weigh the socio-economic costs and benefits of the proposed solution.

2. To what extent did those who gathered those facts use quantitative methods (e.g., representative sample surveys using questionnaires) as compared to qualitative (participant observation, open-ended interviews, focus groups) methods?

3. Assess the extent to which you think your group can justifiably use those facts to claim your analysis proves 'consistent' with the available evidence?

4. If you had time, what further facts would you want to gather, and what methods might you use to gather them?

#### DAY VI: WRITING OUT THE RESEARCH REPORT

X. The form of a competent research report (see *Manual*, ch. 7).

A. Accessible language

B. Signposts

1. Summary introductory paragraph

2. Description of the problem-solving methodology (frequently combined with the summary introductory paragraph).

3. Conclusory paragraph to the research report

4. Mini-introductions

5. Mini-conclusions

6. Connectives

C. Short sentences

1. Correct:

a. "Implicitly adopting the truism that 'Everyone learns from the facts,' a drafter's research report must provide the relevant evidence to justify the bill's substantive provisions, although in reality, readers do not learn merely from propositions stating facts, because by themselves, these propositions stand mute, for they can teach only if explicitly structured by logic."

D. Most important concept at end of the sentence

1. Correct:

- a. "The disposition of industrial wastes causes underground water pollution in urban and peri-urban areas, as a great deal of evidence has shown."
- b. "Bank officials lend funds to enterprises without sufficient proof of the enterprises' financial viability too often."
- c. 'Ministers seldom, if ever, hold hearings involving all the stakeholders, nor do they often request notice and comment, prior to promulgating subsidiary legislation.'

E. Keep together subject and verb, the parts of a compound verb, and verb and object

1. Correct:

- a. "Smallholder farmers do not use, so far as the evidence suggests, drainage ditches to catch the run-off water."
- b. "Many school leavers do not in Bhutan want to return to work in the rural areas."

F. Use as few 'glue words' as possible.

1. Correct:

- a. 'The solution that the bill adopts requires that wastes, whether or not they be industrial or originated by farmers, shall be disposed of in ways to be determined by the Environmental Protection Agency, in rules that shall be promulgated by that Agency.'
- b. 'An attorney who defends a client under the existing Legal Aid Act too often finds it in his interest to use every effort to persuade his client, regardless of whether he or she is innocent, to plead guilty in order to obtain his fee with the least possible time and effort.'

G. Write with nouns and verbs, not adjectives and adverbs.

1. Correct:

- a. 'An important reason why local government councillors do not adequately serve their constituents is that they do not really have the necessary experience or knowledge as to how to meet the demands of their jobs.'
- b. 'A very great many of China's farmers use extremely excessive amounts of various fertilizers, which inevitably find their way into deep underground water courses.'

H. Avoid 'throat-clearing' expressions.

1. Correct:

- a. 'It is widely recognized that the possibility of concealing financial transactions provides officials with many opportunities to engage in corrupt activities.'
- b. 'There are many fast flowing rivers in Bhutan.'

I. Avoid the passsive voice.

1. Correct:

- a. 'The causes of conflict between the national and local governments are frequently found in the ambiguities of existing legislation.'
- b. 'A research report should be written without using the passive voice.'
- c.

J. **Small groups:**

1. Using the information written out in the previous days, members to write out the following 'signposts' to help readers to understand the logic of your research report:

2. Introduction, including:

- a. 'grabber paragraph' to attract readers' attention;
- b. a short paragraph stating the social problem your bill addresses, and the principal thrust of your bill's solution;
- c. background information about the difficulty,



perhaps including an historical section describing the history of the difficulty as it has appeared in your country, and the efforts made to deal with it;

d. a paragraph describing other bills that will likely comprise a legislative programme for the relevant sector, showing where your bill fits in, and explaining your bill's priority;

e. a brief description of the problem-solving methodology, showing how the remaining parts of the report follow the problem-solving approach.

3. Connectives between major sections of the report, i.e., a sentence at the end of each major part to explain how it lays the basis for the next part; and an introduction to each part to tell reader how it fits into the logic of the report, and outlining the main points it will make.

4. A general conclusion, including a summary of the overall findings of each part and a review of your bill's main provisions and how they will likely help to overcome the causes of the existing social problem. (If, after careful assessment, your group thinks further factual information seems necessary to justify your proposed bill, say so.)

5. Identify main points at which your report requires references as to sources of information cited, and write out the references according to a standard form.

Note: Over the weekend, try to pull together all the parts of your research report into a completed draft.

## DAY VII: STRUCTURING YOUR BILL

**Read Manual, Ch. 8.**

XI. The problem of a bill's form, in general.

A. Criteria for decisions about form determined by the drafter's role.

### 1. Plenary discussion:

a. If a drafter serves primarily as a *communicator* of laws with the principal function of *declaring rights and duties*, what should be the criteria for

the performance of the drafter's role?

b. If the drafter serves primarily as a *translator of policy* into laws with the principal function of *inducing prescribed behaviors*, what should those criteria be?

c. In determining the appropriate criteria for the drafter's role, does it matter whether a bill's form and content constitute a unity, or whether form and content constitute separate elements of a bill?

B. Grouping and ordering: In general

1. The parts of a bill

a. The section as the bill's building block.

2. Grouping and ordering defined

3. **Plenary discussion:** Possible principles of grouping and ordering; to which ought a drafter adhere?

a. The 'golden thread';

b. 'logic';

c. utility to a bill's prospective users.

C. A default system for grouping and ordering: LAW, IMPLEMENTATION, SANCTIONS, FUNDING

D. **Small groups:**

1. Based on your research report's suggestions about what your bill will contain, discuss the extent to which the default outline (see **Manual, Ch. 8, pp. 18-27**) seems appropriate for your bill.

2. Each member of the group do a first draft of one part of the bill (general, law, implementation, sanctions, appropriations, miscellaneous). Within each part, be sure to think about the logical ordering of the sections.

#### DAY VIII: WRITING THE SENTENCES

**Read Manual, Chs. 9, 10**

XII. Almost all legislative sentences prescribe *who does what*, ensuring clarity and avoiding ambiguity

A. Why do almost all legislative sentences prescribe *who does what*?

B. Guides to specifying the 'who'

1. General criteria:

- a. Who acts?
- b. a legal person;
- c. distinguish between *imposing an obligation to act*, describing a *status relationship*, and the indication of *future action* without involving an obligation to act.
- 2. Use your own language's resources for specifying who does what accurately.

a. For example, in English, avoid the passive voice; use the singular rather than the plural; etc.

b. What linguistic rules might help in specifying the Who in your language?

C. Guides to specifying the 'what'.

1. General criteria

a. Do not include argumentative or descriptive material.

b. Draft in terms of behaviors, not rights and duties.

c. Distinguish between imposing a duty to act, and granting a discretionary power

d. Distinguishing between the case, the condition, and the exception. (In English, the rule against the proviso).

2. What linguistic rules might help in specifying the What in your language?

D. **Small groups:**

- 1. Each group member should write the legislative sentences for the sections that make up one part of the bill, specifying *who does what* clearly and unambiguously.

2. The group should critically assess and revise the sentences that comprise each section of the bill.

#### DAY IX: DRAFTING WITHIN CONSTRAINTS, AIDS TO INTERPRETATION, FORMAL MATTERS AND AMENDMENTS

*Read Manual, Ch. 11*

XIII. While drafters try to meet their 'clients' demands, they do so within constitutional and other constraints

**Small groups:** Discuss the specific constraints that you, as a drafting team, must consider in drafting your bill: The constitution, ministry instructions, the Interpretation Act, other constraints.

XIV. Internal aids to interpretation

*Read Manual, Ch. 12*

A. The problem of interpretation

1. A rule's core meaning and penumbra

2. Selected devices for guiding a judge's discretion in deciding penumbral cases.

- a. Definitional sections

- b. General purposes sections

- c. Preamble

- d. Legislative history (including the research report)

3. Small groups:

- a. Identify all the possible aids you should include in your bill to facilitate interpretation.

- b. Each member of the group to write one of the aids to interpretation which the group has decided seems likely to prove useful to ensure appropriate interpretation of your bill.

XV. Formal matters and amendments: Ensuring coherence and consistency

*Read Manual, Ch. 13*

**A. Small group:**

1. Find out whether Bhutan's legislation has been consolidated, and if so where your bill should fit into that system.
2. Identify other bills that may require amendment as a result of your bill, and, considering possible ways, justify the way you plan to make those amendments.
3. How will you avoid confusion as to when, after its enactment, your bill goes into force?
4. Will your bill contain any retroactive provisions? If so, explain why and how you will ensure their proper enforcement.
5. Will your bill contain any savings provisions? If so, draft them.

**DAYS X-XII: CRITIQUE SESSIONS**

Each group, in turn, will submit its bill and research report to the entire group for a systematic, constructive critique as to substance and form. Copies of the bill and report, no matter how rough, should be provided to all members of the plenary session the day before the scheduled critique

**DAY XII: FINAL EVALUATION OF WORKSHOP**

August 18, 1999

OUTLINE FOR TWO WEEK WORKSHOP  
Thimphu, 1999

**DAY I: TRANSLATING POLICY INTO EFFECTIVE LAW**

Morning session:

**I. 10:00 - 12:00 Purpose and structure of workshop: (Prof. Robert B. Seidman)**

**A. Objectives:**

1. draft bills and research reports
2. learn legislative theory and methodology

**B. Teaching method: learning-by-doing in small groups**

1. discuss issues of theory and practice
2. prepare bills and reports

**C. Plenary discussion:** "Nobody fixes something unless they think it is broken. Legislation always addresses a social problem." Discuss.

**1. Small groups: Discuss: (45 minutes)**

- a. What do you understand by 'social problem'?
- b. Describe how the social problem that your group's bill and research report will address presently appears to you?

**II. In aid of social, political and economic development, what constitutes the drafter's task?**

**A. Introduction: Plenary discussion: (Prof. Robert Martineau)**

1. In Bhutan today, who writes the final draft of most bills? How do they go about their task?
2. In connection with proposed legislation, what do most civil servants in the line ministries consider as their primary task?
3. This workshop adopts the approach that drafters should include both **ministry officials** -- who know the facts about the social problems bills aim to solve --

and **legally-trained drafters** -- who know legislative drafting techniques. These must work together to **ensure the unity of the bill's form and substance in translating policy into effectively implementable law.**

*Read Manual, Chapters 1-3*

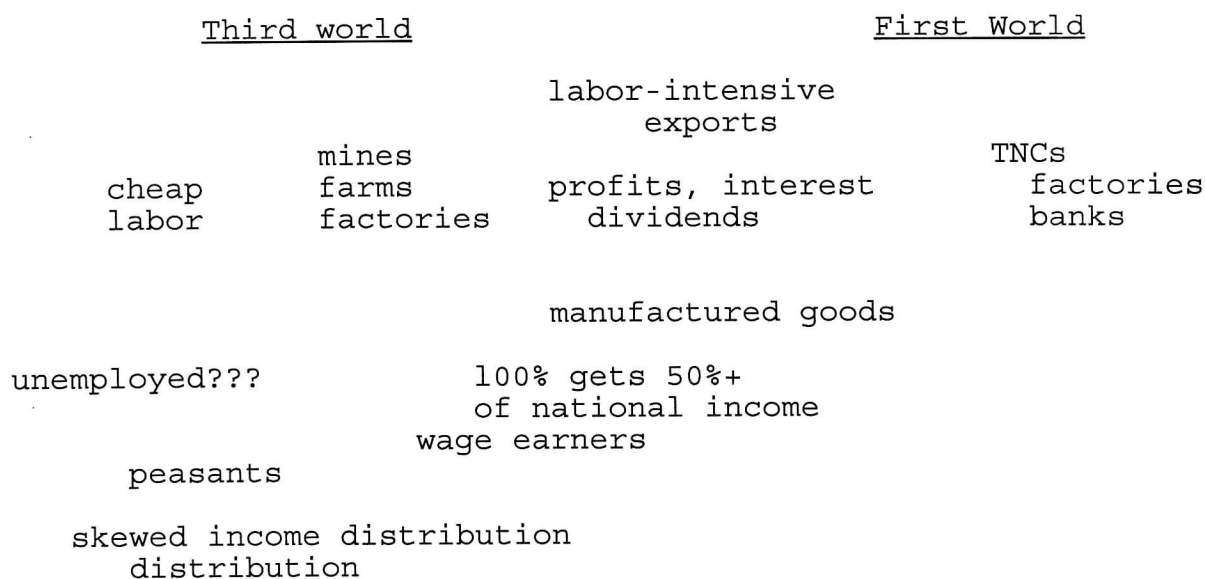
B. Development in the larger context; development and institutions: Four categories of priority issues for development. (Prof. Ann Seidman)

1. *Economic development*

a. Consider the model in Fig. 1

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**Fig. 1: Model of Third World Dependency**



(belongs in Manual, Chapter 3, p. 9).

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b. Considered as a model of resource allocation, does the model generally describe Bhutan's circumstances? What special Bhutanese circumstances exist that require some modification of the model?

c. Can government do anything *directly* about resource allocations?

d. 'The model of resource allocation and dependency also constitutes a model of

*institutions and their relationships.'* Discuss.

e. 'The difference between one society and another, or between a less developed and a more developed society, lies in their institutional differences.' Discuss.

2. 'Efficiency' and 'equity': The vocabulary of human rights in development as a movement to consider not only efficiency but also distributive consequences of development initiatives.

3. 'Effective governance': Ineffective development programs as social problems.

a. Government has earlier addressed almost every social problem that one can identify. The 'social problem' as it appears to the drafters almost invariably includes the failure of past efforts at solution.

4. 'Good governance': Arbitrary decision-making as social problems. In this connection, the 'social problem' as it appears almost everywhere includes repeated arbitrary decision-making -- especially, corruption and the overhanging threat of corruption.

#### 5. Small groups

a. Give one example in Bhutan of each of these social problems.

Afternoon session:

#### C. Institutions and behavior: Plenary discussion. (Professor Robert Seidman)

1. What do you understand by the word 'institution'? Give some examples.

2. What do you understand by the word 'development'? Give some examples of a more developed and of a developing society, and describe the key differences

3. Consider an institution as *repetitive social behaviors*? In that interpretation, is the judiciary an institution? the legislature Why? Is your department or ministry an institution? Why? Is the family an institution? Is this course an institution?



4. 'The processes of development require *institutional changes* to resolve the poverty and dependency that presently characterize the poor nations, and their ineffective and poor governance.' Discuss.

5. 'The processes of development require widespread changes in repetitive patterns of behavior.' Discuss.

D. Government, law and institutional change.

1. **Plenary discussion:** The many functions of law.

a. Law has many functions, for example: Dispute settlement, the authoritative declaration of rights and duties, supporting the power and privilege of the ruling class, articulating deeply held social values, channelling various social behaviors into desired ways.

b. For purposes of social, political and economic development, which of these many functions of law seem to you the most important? Why?

E. Social problems consist of problematic sets of behaviors, that is, of problematic *institutions*.

1. **Plenary discussion:**

a. Consider the social problem that you have identified as the target of your proposed bill. Did you initially describe it as a resource allocation or as a behavioural problem? Can you describe it as a problem in resource allocation?

b. Describe it as a behavioral problem.

c. Can one describe every social problem as a behavioral problem?

F. The legal order as government's principal tool for social change, i.e., for addressing social problems.

1. **Plenary discussion:**

a. Is it true that Government invariably translates a seriously intended, publicly avowed policies as a law? Any exceptions?

b. Why does government do that? Why not merely announce the policy?

G. The role of the drafters.

1. In this workshop, the word 'drafters' refers to both line ministry officials concerned with getting legislation drafted, and the lawyers who write the technically-finished draft bills. Those two groups should join in producing a finished bill for presentation to the legislature. Together, they constitute the *drafters*.

2. Two views of the drafter's role:

a. The drafter as *communicator of someone else's policy*, and therefore as disinterested in the bill's substance.

(1) This view of drafter long inculcated by British tradition.

(a) Practically all drafting courses focus on training drafters to draft unambiguous, well-written bills to communicate law to its addressees.

(b) That reflects an all but universal myth that drafters have nothing to do with the *substance* of legislation, but only its *form*.

(c) Myth's history: In 19th Century England, in the face of ministries' objections to the establishment of the central drafting office (and the ministries' seeming loss of control over their own bills), the new head of the drafting office insisted it would never change the ministries' bills' substance, but only improve their form.

b. The drafter as *translator* of policy into law, and therefore an active participant in developing the bill's substance.

3. Plenary discussion:

a. Why should drafters include both line ministry officials and those who draft the technical form of the final bill?

b. What constitutes the principal function of the law and the legal order in development?

c. What constitutes the principal function of drafters in development? Does your view of the unity of form and substance in drafting, or their relative disunity, affect your answer to that question?

d. What role in fact do drafters play in the bill-creating process?

### III. How law affects behaviors (Prof. Robert Seidman)

#### A. Recapitulation

1. Social problems all but invariably consist of ensembles of problematic behaviors.

2. Government 'policies' invariably expressly or by necessary implication address social problems (nobody fixes something that does not need fixing).

3. All seriously intended, publicly-avowed governmental policies sooner or later appear as a law or regulation.

4. In development, drafters have a principal function of writing laws and regulations that actually induce behaviors likely to alleviate the identified social problem.

B. **Plenary discussion:** The critical question that a drafter must answer is, 'Why do people behave as they do in the face of a rule of law?' Do you agree with that statement?

C. Why do people behave as they do in the face of a rule of law?

#### 1. **Plenary discussion:**

a. Consider the following two cases:

(1) A small side street intersects with a busy main highway (for example, Thimphu's main street), with an average highway speed of 100 km per hour. A stop sign exists on the side street at its intersection with the highway. From the side street, a motorist has easy visibility up and down the main street. You observe that most cars stop at

the intersection; a few slow down but do not come to a stop, especially in the small hours of the morning when there is very little traffic on the highway and what there is can be seen for a long distance because of the loom of the cars' headlights. In the daytime during the rush hours, a policeman is on point duty at the intersection, controlling traffic. To what extent does the law explain the behavior of the drivers at the intersection?

(2) One year ago, on January 15, Newstate's new income tax law came into force. Its Income Tax Department came in to existence at the same time. The law requires individuals and companies to self-report their income on forms provided by the Department for that purpose. The forms are due on January 15. By January 20 of the current year, only some 47% of taxpayers appear to have filed forms. To what extent does the law explain their behaviour?

2. Why people behave as they do in the face of a rule of law constitutes a central problematic for the discipline of sociology of law. For drafters, sociology of law becomes a *professional* subject.

a. The Norwegian anthropologist Karl Barth held that the simplest model of society consisted of individuals and collectivities (for example, corporations, ministries) making choices within the limited range of choices permitted by the circumstances, and within the constraints and resources imposed by those circumstances.

b. That theory underpins the model (This Figure 1-1 belongs in Manual, ch.1, p. 17)

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**Fig. 1-1: A MODEL RELATING LAW TO THE BEHAVIOR**

OF ITS

# ADDRESSEES

time- and place-specific  
circumstances

law makers

rule

rule

implementing  
agency (secondary  
role occupants)

sanctions

primary role  
occupant

time- and place-  
specific  
circumstances

time- and place-  
specific  
circumstances

=====

## 3. The model described

- a. Given that, as a principal function, law aims to channel behaviors to solve social problems, does it make sense to say, "It is a good law but badly implemented?"

## 4. The uses of the model as *an inspiration for explanatory hypotheses (or 'educated guesses')*

### a. Plenary discussion:

(1) Consider the behavior of motorists at the intersection of a side street and a main highway. Based on the model before us, what hypotheses would you put forward as explaining the behaviour of motorists at that intersection?

(2) In general, what categories of factors does the model advise the drafter to consider in explaining problematic behaviors?

## 5. The uses of the model as a guide to drafting new laws.

(1) Consider the behaviour of taxpayers in the face of Newstate's new income tax law. Based on the model, what hypotheses would you put forward to explain the behaviour of the

delinquent taxpayers? What proposals would you put forward to increase the number of reporting taxpayers?

(2) In general, what categories of factors does the model advise the drafter to consider in devising new, effective legislation?

(3) The world around, to devise a new law, most commonly drafters copy the law from some other jurisdiction (in the developing world, most commonly the law of a 'developed' country). Does the model teach us anything about the advisability of copying law?

## DAY II: JUSTIFYING A BILL: THE RESEARCH REPORT

Morning session:

### IV. The purpose and structure of the research report: (Prof. Ann Seidman)

Read: **Manual**, ch. 4, pp 1-7

A. The functions of a research report: as a --

1. *justification* for a bill;
2. *guide to decision-making*;
3. *device to inform decision-makers* about the factual basis for the bill

B. Decision-making methodology and the structure of the research report: In general.

1. Various methods by which drafters elsewhere (including both line officials and drafters in the central drafting office) decide on the substance of a bill in light of a given policy, briefly described:

- a. Copying law
- b. Criminalizing behaviour
- c. Compromise between claims and demands of competing interest groups.
- d. Ends-means
- e. Incrementalism
- f. Problem-solving's four steps:
  - (1) Social problem addressed (or 'difficulty')
  - (2) Explanations
  - (3) Solution (the bill)
  - (4) Implementation and monitoring.

C. **Plenary discussion:** To what extent, from time to time, have drafters of Bhutanese legislation used any or some or all of these methodologies for designing new bills?

D. **Small groups:** The Minister asks you to prepare instructions for a drafting team to draft the bill with which your group is concerned. Write those instructions in three ways: As if you followed --

1. an ends-means approach;
2. an incrementalist approach; and
3. a problem-solving approach.

E. The detailed outline of a research report using the problem-solving methodology as the basis for decision-making:

1. The outline for the research report follows the logic of legislative theory: *The explanation of causes of behaviours lays the basis for proposed detailed measures in bill (i.e., solutions)*

Read **Manual**, Chapter IV, pp. 35-39

V. The Introduction to the research report

A. The functions of the Introduction

1. To locate the reader in the subject-matter of the research report.
2. In particular, to locate the particular social problem addressed in the general agenda concerning development.

B. **Small groups:**

1. What general program does the line ministry have to address the sector concerned?
2. Where does the particular social problem at hand fit into that program?
3. Can you justify the selection of your bill for priority in drafting in terms of human rights to development, sustainable human development, effective governance and/or the need for non-arbitrary decision-making?

Afternoon session:

**VI. Describing the difficulty: (Prof. Robert B. Seidman)**

A. The detailed analysis of the difficulty as the foundation of the research report and the bill.

1. 'Unpacking' problematic social behaviors in to their different sets and groupings.

B. **Small groups:** Using the checklist for a research report, write the 'difficulty' section of your research report. (First discuss in group, then assign each group member the task of outlining a part of the 'difficulty' section).

- [1. For the moment, exclude the mini-introduction and mini-conclusions; we will discuss those later]
2. Describe facts relating to:
  - a. the difficulty's superficial manifestation;
  - b. whose and what behaviors seems problematic.
  - c. [Provide the facts, based on whatever knowledge you now have (If time and resources permit, the hypotheses you now formulate on the basis of your current knowledge can guide you in gathering further facts. Otherwise, like most bills, yours will rest on the information you presently have available. Never fear: The line ministries usually have a great deal of information about the problems for which they propose to draft a bill.)]

C. Three preliminary choices:

1. The scope of the bill; avoid 'stuffing' the bill.
2. In problem-solving, the function of the history of the problem and previous Bhutanese attempts to solve it, and its appropriate location in the research report.
3. In problem-solving, the function of foreign law and experience, and its location in the research report;.

**DAY III: EXPLAINING CAUSES OF PROBLEMATIC BEHAVIOURS**

VII. Legislative theory's research agenda for explaining role occupants' behaviours: The ROCCIPI research agenda **Manual, Ch.**



4, pp.12-20)

A. The second step of the problem-solving agenda (stated above): 'Formulate explanatory hypotheses (educated guesses) as to causes for role occupants' behaviors (including existing implementation agencies)'

1. The ROCCUPI categories, broadly construed, suggest possible hypotheses to explain the interrelated causes of a role occupant's behaviours in the face of a rule of law.

a. They direct attention at both 'legal' and 'non-legal' causes for behavior.

2. **Small groups:**

a. For your bill, insofar as you now can, use ROCCUPI agenda to complete the section of the outline (**Manual, Box 4-5, pp. 35-9**) relating to explanations of an important primary role occupant's problematic behaviours.

(1) Write out your 'educated guesses' as to causes (be sure to distinguish between **causes** and **conditions**).

(2) Include whatever facts you have that show your 'guesses' appear consistent with the evidence (be sure to assess the available facts; see **Manual, Ch. 6**).

B. Explaining implementing agency behavior.

1. Implementation is central issue relating to use of law for social change: **Manual, Ch. 5**

a. The ROCCUPI categories that help develop hypotheses to explain primary role occupant's behaviors serve the same function with respect to explaining implementing agencies' behaviors (**Manual, Ch. 5-pp. 5-23**).

2. Issues of special importance in explaining implementing agency behaviors

a. Because implementing agencies always comprise complex organizations, an additional model helps to generate hypotheses to explain the *processes* within which agency role occupants decide how to

behave (see **Figure 5-1, Manual, Ch. 5, p. 11**).

b. Whether the agency is primarily *proactive* or *reactive* frequently explains its Capacity to implement the law.

c. The system of *appeals* from agency decision, and the *transparency of its decision-making* frequently determine its *accountability* and therefore the relatively arbitrary character of its decisions.

### 3. **Small groups:**

a. Each group member should take 15 minutes to write down the factors (including available supporting facts) that he or she can think of under **one ROCCIPI category** as to causes of officials' problematic behaviours that under existing law seem to hinder effective implementation.

b. Group as whole should review members' explanations, and, *considering all the facts they know and the interrelated impact of the several causes*, revise and strengthen their explanations for the implementing agency's problematic behaviours (Note points at which getting more facts might prove useful; see **Manual, Ch. 6**).

c. Assess the available facts' utility for the validity of your combined explanations.

d. What questions would you ask about foreign law and experience to obtain a better understanding about possible causes of problematic implementation behaviors?

## **DAY IV: FORMULATING LEGISLATIVE SOLUTIONS (THE BILL'S DETAILED MEASURES)**

VIII. The problem-solving methodology's basic logic teaches that a *bill's detailed provisions* should address each cause for the problematic behaviours that constitute the social problem that the bill addresses. (Review **Manual, Chapters 4,5**).

A. Possible alteernative 'solutions': Proposing detailed

alternative measures for your bills.

1. Where derived:

- a.Foreign law and experience;
- b.professional literature;
- c.Bhutanese experience;
- d.own ideas.

B. Choosing between alternatives

1.List possible alternative solutions (i.e, the detailed measures) for your bill.

2. Review causes for role occupants' problematic behaviours;

3. list measures of for overcoming causes of primary role occupants' behaviours:

a.Direct measures (rewards and punishments)

b. Roundabout measures (to change factors that cause problematic behaviors;

c.Educative measures (to change values and attitudes).

4. List measures to overcome causes of the implementing agency's problematic behaviours.

a. Alternative forms of the implementing agency.

(1) In general

- (a) Transitive or intransitive agency;
- (b) Old or new agency;
- (c) Proactive or reactive.

(2) The form of the agency

- (a) Implementation through dispute settlement;
- (b) bureaucratic implementation (usually, a ministry);
- (c) implementation by a public corporation' or
- (d) implementation through the private sector

5.Small groups:

- a. Using the ROCCIPI agenda and the complex decision-making model, outline the solution section of your research report with respect to the proposed implementing agency's input-, conversion-, or feedback processes.
  - b. Testing your proposed solution:
    - (1) Do proposed measures seem to address the identified causes? Will they likely induce the prescribed behaviors? ('ROCCIPI in reverse')
    - (2) What provisions concerning the implementing agency seem likely to ensure more effective implementation?
    - (3) What questions would you ask about foreign law and experience as to whether your proposed measures seem likely to work?
  - c. Outline the sections of the research report concerning the proposed solution (see Outline in the *Manual*)
- C. Make a social cost/benefit analysis of all the alternative possible solutions (measures addressed to primary role occupants and to implementing agencies) as a basis for selecting your group's preferred solution (see *Manual*, Ch. 4, pp. 20-7)
1. **Small groups:** Outline socio-economic costs and benefits of your bill's proposed measures:
    - a. List monetary costs and benefits to:
      - (1) Stakeholders (that is, everyone affected by the bill)
      - (2) Government
    2. List social consequences for:
      - a. Sustainable development
      - b. Vulnerable groups (women, children, aged, poor, ethnic minorities);
      - c. Inchoate values (human rights, environment, good governance).
- D. Devices to avoid arbitrary decision-making and corrupt

behaviours

1. **Small groups:**

a. Assess proposed implementing agency's criteria and procedures in terms of the following:

(1) Do they sufficiently limit officials' discretion, and provide transparency, and accountability?

(2) do they ensure that those affected (especially historically-disadvantaged groups) participate as much as possible in input-, feedback- and conversion-processes?

b. What questions might you ask about foreign law and experience to learn of possible ways to improve implementing agency's criteria and procedures for decision-making?

c. To reduce dangers of arbitrary decision-making and corrupt behaviours, what would the group recommend about possible changes in the research report's solutions section

**DAY V: SOCIAL SCIENCE RESEARCH METHODS FOR DRAFTERS**  
Read Manual, Ch. 6

IX. To justify the claim that your bill's proposed measures rest on reason **informed by experience**, you must be sure that your hypotheses (educated guesses) as to the nature and causes of the difficulty and the problematic behaviors that comprise it prove **consistent with sufficient evidence** to make it likely that your proposed solutions, designed to overcome those causes, will lead to the desired social consequences

A. **Small groups:**

1. Identify the kinds of facts, and where you obtained them, that you have used in your research report to:

a. To describe the social problem and the behaviours that comprise it;

b. To support your claims as to the causes of the problematic behaviours;

c. To weigh the socio-economic costs and benefits of the proposed solution.

2. To what extent did those who gathered those facts use quantitative methods (e.g., representative sample surveys using questionnaires) as compared to qualitative (participant observation, open-ended interviews, focus groups) methods?

3. Assess the extent to which you think your group can justifiably use those facts to claim your analysis proves 'consistent' with the available evidence?

4. If you had time, what further facts would you want to gather, and what methods might you use to gather them?

#### DAY VI: WRITING OUT THE RESEARCH REPORT

X. The form of a competent research report (see *Manual*, ch. 7)

A. Accessible language

B. Signposts

1. Summary introductory paragraph

2. Description of the problem-solving methodology (frequently combined with the summary introductory paragraph).

3. Conclusory paragraph to the research report

4. Mini-introductions

5. Mini-conclusions

6. Connectives

C. Short sentences

1. Correct:

a. "Implicitly adopting the truism that 'Everyone learns from the facts,' a drafter's research report must provide the relevant evidence to justify the bill's substantive provisions, although in reality, readers do not learn merely from propositions stating facts, because by themselves, these propositions stand mute, for they can teach only if explicitly structured by logic."

D. Most important concept at end of the sentence

1. Correct:

- a. "The disposition of industrial wastes causes underground water pollution in urban and peri-urban areas, as a great deal of evidence has shown."
- b. "Bank officials lend funds to enterprises without sufficient proof of the enterprises' financial viability too often."
- c. 'Ministers seldom, if ever, hold hearings involving all the stakeholders, nor do they often request notice and comment, prior to promulgating subsidiary legislation.'

E. Keep together subject and verb, the parts of a compound verb, and verb and object

1. Correct:

- a. "Smallholder farmers do not use, so far as the evidence suggests, drainage ditches to catch the run-off water."
- b. "Many school leavers do not in Bhutan want to return to work in the rural areas."

F. Use as few 'glue words' as possible.

1. Correct:

- a. 'The solution that the bill adopts requires that wastes, whether or not they be industrial or originated by farmers, shall be disposed of in ways to be determined by the Environmental Protection Agency, in rules that shall be promulgated by that Agency.'
- b. 'An attorney who defends a client under the existing Legal Aid Act too often finds it in his interest to use every effort to persuade his client, regardless of whether he or she is innocent, to plead guilty in order to obtain his fee with the least possible time and effort.'

G. Write with nouns and verbs, not adjectives and adverbs.

1. Correct:

- a. 'An important reason why local government councillors do not adequately serve their constituents is that they do not really have the necessary experience or knowledge as to how to meet the demands of their jobs.'
- b. 'A very great many of China's farmers use extremely excessive amounts of various fertilizers, which inevitably find their way into deep underground water courses.'

H. Avoid 'throat-clearing' expressions.

1. Correct:

- a. 'It is widely recognized that the possibility of concealing financial transactions provides officials with many opportunities to engage in corrupt activities.'
- b. 'There are many fast flowing rivers in Bhutan.'

I. Avoid the passsive voice.

1. Correct:

- a. 'The causes of conflict between the national and local governments are frequently found in the ambiguities of existing legislation.'
- b. 'A research report should be written without using the passive voice.'
- c.

J. **Small groups:**

1. Using the information written out in the previous days, members to write out the following 'signposts' to help readers to understand the logic of your research report:

2. Introduction, including:

- a. 'grabber paragraph' to attract readers' attention;
- b. a short paragraph stating the social problem your bill addresses, and the principal thrust of your bill's solution;
- c. background information about the difficulty,



perhaps including an historical section describing the history of the difficulty as it has appeared in your country, and the efforts made to deal with it;

d. a paragraph describing other bills that will likely comprise a legislative programme for the relevant sector, showing where your bill fits in, and explaining your bill's priority;

e. a brief description of the problem-solving methodology, showing how the remaining parts of the report follow the problem-solving approach.

3. Connectives between major sections of the report, i.e., a sentence at the end of each major part to explain how it lays the basis for the next part; and an introduction to each part to tell reader how it fits into the logic of the report, and outlining the main points it will make.

4. A general conclusion, including a summary of the overall findings of each part and a review of your bill's main provisions and how they will likely help to overcome the causes of the existing social problem. (If, after careful assessment, your group thinks further factual information seems necessary to justify your proposed bill, say so.)

5. Identify main points at which your report requires references as to sources of information cited, and write out the references according to a standard form.

Note: Over the weekend, try to pull together all the parts of your research report into a completed draft.

## DAY VII: STRUCTURING YOUR BILL

**Read Manual, Ch. 8.**

XI. The problem of a bill's form, in general.

A. Criteria for decisions about form determined by the drafter's role.

### 1. Plenary discussion:

a. If a drafter serves primarily as a *communicator* of laws with the principal function of *declaring rights and duties*, what should be the criteria for

the performance of the drafter's role?

b. If the drafter serves primarily as a *translator of policy* into laws with the principal function of *inducing prescribed behaviors*, what should those criteria be?

c. In determining the appropriate criteria for the drafter's role, does it matter whether a bill's form and content constitute a unity, or whether form and content constitute separate elements of a bill?

B. Grouping and ordering: In general

1. The parts of a bill

a. The section as the bill's building block.

2. Grouping and ordering defined

3. **Plenary discussion:** Possible principles of grouping and ordering; to which ought a drafter adhere?

a. The 'golden thread';

b. 'logic';

c. utility to a bill's prospective users.

C. A default system for grouping and ordering: LAW, IMPLEMENTATION, SANCTIONS, FUNDING

D. **Small groups:**

1. Based on your research report's suggestions about what your bill will contain, discuss the extent to which the default outline (see **Manual, Ch. 8, pp. 18-27**) seems appropriate for your bill.

2. Each member of the group do a first draft of one part of the bill (general, law, implementation, sanctions, appropriations, miscellaneous). Within each part, be sure to think about the logical ordering of the sections.

#### DAY VIII: WRITING THE SENTENCES

**Read Manual, Chs. 9, 10**

XII. Almost all legislative sentences prescribe *who does what*, ensuring clarity and avoiding ambiguity

A. Why do almost all legislative sentences prescribe *who does what*?

B. Guides to specifying the 'who'

1. General criteria:

- a. Who acts?
  - b. a legal person;
  - c. distinguish between *imposing an obligation to act*, describing a *status relationship*, and the indication of *future action* without involving an obligation to act.
2. Use your own language's resources for specifying who does what accurately.

a. For example, in English, avoid the passive voice; use the singular rather than the plural; etc.

b. What linguistic rules might help in specifying the Who in your language?

C. Guides to specifying the 'what'.

1. General criteria

a. Do not include argumentative or descriptive material.

b. Draft in terms of behaviors, not rights and duties.

c. Distinguish between imposing a duty to act, and granting a discretionary power

d. Distinguishing between the case, the condition, and the exception. (In English, the rule against the proviso).

2. What linguistic rules might help in specifying the What in your language?

D. Small groups:

- 1. Each group member should write the legislative sentences for the sections that make up one part of the bill, specifying *who does what* clearly and unambiguously.

2. The group should critically assess and revise the sentences that comprise each section of the bill.

**DAY IX: DRAFTING WITHIN CONSTRAINTS, AIDS TO INTERPRETATION,  
FORMAL MATTERS AND AMENDMENTS**

*Read Manual, Ch. 11*

XIII. While drafters try to meet their 'clients' demands, they do so within constitutional and other constraints

**Small groups:** Discuss the specific constraints that you, as a drafting team, must consider in drafting your bill: The constitution, ministry instructions, the Interpretation Act, other constraints.

XIV. Internal aids to interpretation

*Read Manual, Ch. 12*

A. The problem of interpretation

1. A rule's core meaning and penumbra
2. Selected devices for guiding a judge's discretion in deciding penumbral cases.
  - a. Definitional sections
  - b. General purposes sections
  - c. Preamble
  - d. Legislative history (including the research report)
3. Small groups:
  - a. Identify all the possible aids you should include in your bill to facilitate interpretation.
  - b. Each member of the group to write one of the aids to interpretation which the group has decided seems likely to prove useful to ensure appropriate interpretation of your bill.

XV. Formal matters and amendments: Ensuring coherence and consistency

*Read Manual, Ch. 13*

**A. Small group:**

1. Find out whether Bhutan's legislation has been consolidated, and if so where your bill should fit into that system.
2. Identify other bills that may require amendment as a result of your bill, and, considering possible ways, justify the way you plan to make those amendments.
3. How will you avoid confusion as to when, after its enactment, your bill goes into force?
4. Will your bill contain any retroactive provisions? If so, explain why and how you will ensure their proper enforcement.
5. Will your bill contain any savings provisions? If so, draft them.

**DAYS X-XII: CRITIQUE SESSIONS**

Each group, in turn, will submit its bill and research report to the entire group for a systematic, constructive critique as to substance and form. Copies of the bill and report, no matter how rough, should be provided to all members of the plenary session the day before the scheduled critique

**DAY XII: FINAL EVALUATION OF WORKSHOP**

August 18, 1999

OUTLINE FOR TWO WEEK WORKSHOP  
Thimphu, 1999

**DAY I: TRANSLATING POLICY INTO EFFECTIVE LAW**

Morning session:

**I. 10:00 - 12:00 Purpose and structure of workshop: (Prof. Robert B. Seidman)**

A. Objectives:

1. draft bills and research reports
2. learn legislative theory and methodology

B. Teaching method: learning-by-doing in small groups

1. discuss issues of theory and practice
2. prepare bills and reports

C. **Plenary discussion:** "Nobody fixes something unless they think it is broken. Legislation always addresses a social problem." Discuss.

1. **Small groups: Discuss:** (45 minutes)

- a. What do you understand by 'social problem'?
- b. Describe how the social problem that your group's bill and research report will address presently appears to you?

**II. In aid of social, political and economic development, what constitutes the drafter's task?**

A. Introduction: **Plenary discussion: (Prof. Robert Martineau)**

1. In Bhutan today, who writes the final draft of most bills? How do they go about their task?
2. In connection with proposed legislation, what do most civil servants in the line ministries consider as their primary task?
3. This workshop adopts the approach that drafters should include both **ministry officials** -- who know the facts about the social problems bills aim to solve --

and legally-trained drafters -- who know legislative drafting techniques. These must work together to ensure the unity of the bill's form and substance in translating policy into effectively implementable law.

Read Manual, Chapters 1-3

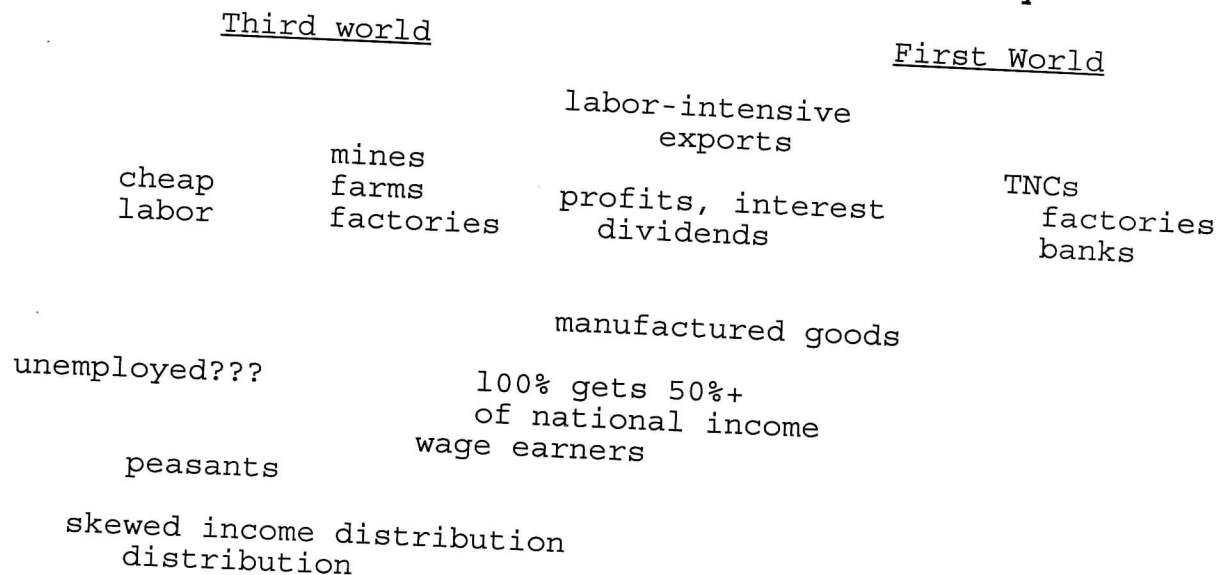
B. Development in the larger context; development and institutions: Four categories of priority issues for development. (Prof. Ann Seidman)

1. *Economic development*

a. Consider the model in Fig. 1

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Fig. 1: Model of Third World Dependency



(belongs in Manual, Chapter 3, p. 9).

=====

b. Considered as a model of resource allocation, does the model generally describe Bhutan's circumstances? What special Bhutanese circumstances exist that require some modification of the model?

c. Can government do anything *directly* about resource allocations?

d. 'The model of resource allocation and dependency also constitutes a model of

*institutions and their relationships.'* Discuss.

e. 'The difference between one society and another, or between a less developed and a more developed society, lies in their institutional differences.' Discuss.

2. 'Efficiency' and 'equity': The vocabulary of human rights in development as a movement to consider not only efficiency but also distributive consequences of development initiatives.

3. 'Effective governance': Ineffective development programs as social problems.

a. Government has earlier addressed almost every social problem that one can identify. The 'social problem' as it appears to the drafters almost invariably includes the failure of past efforts at solution.

4. 'Good governance': Arbitrary decision-making as social problems. In this connection, the 'social problem' as it appears almost everywhere includes repeated arbitrary decision-making -- especially, corruption and the overhanging threat of corruption.

#### 5. **Small groups**

a. Give one example in Bhutan of each of these social problems.

Afternoon session:

#### C. **Institutions and behavior: Plenary discussion.** (Professor Robert Seidman)

1. What do you understand by the word 'institution'? Give some examples.

2. What do you understand by the word 'development'? Give some examples of a more developed and of a developing society, and describe the key differences

3. Consider an institution as *repetitive social behaviors*? In that interpretation, is the judiciary an institution? the legislature Why? Is your department or ministry an institution? Why? Is the family an institution? Is this course an institution?



4. 'The processes of development require *institutional changes* to resolve the poverty and dependency that presently characterize the poor nations, and their ineffective and poor governance.' Discuss.

5. 'The processes of development require widespread changes in repetitive patterns of behavior.' Discuss.

D. Government, law and institutional change.

1. **Plenary discussion:** The many functions of law.

a. Law has many functions, for example: Dispute settlement, the authoritative declaration of rights and duties, supporting the power and privilege of the ruling class, articulating deeply held social values, channelling various social behaviors into desired ways.

b. For purposes of social, political and economic development, which of these many functions of law seem to you the most important? Why?

E. Social problems consist of problematic sets of behaviors, that is, of problematic *institutions*.

1. **Plenary discussion:**

a. Consider the social problem that you have identified as the target of your proposed bill. Did you initially describe it as a resource allocation or as a behavioural problem? Can you describe it as a problem in resource allocation?

b. Describe it as a behavioral problem.

c. Can one describe every social problem as a behavioral problem?

F. The legal order as government's principal tool for social change, i.e., for addressing social problems.

1. **Plenary discussion:**

a. Is it true that Government invariably translates a seriously intended, publicly avowed policies as a law? Any exceptions?

b. Why does government do that? Why not merely announce the policy?

## G. The role of the drafters.

1. In this workshop, the word 'drafters' refers to both line ministry officials concerned with getting legislation drafted, and the lawyers who write the technically-finished draft bills. Those two groups should join in producing a finished bill for presentation to the legislature. Together, they constitute the *drafters*.

### 2. Two views of the drafter's role:

a. The drafter as *communicator of someone else's policy*, and therefore as disinterested in the bill's substance.

(1) This view of drafter long inculcated by British tradition.

(a) Practically all drafting courses focus on training drafters to draft unambiguous, well-written bills to communicate law to its addressees.

(b) That reflects an all but universal myth that drafters have nothing to do with the *substance* of legislation, but only its *form*.

(c) Myth's history: In 19th Century England, in the face of ministries' objections to the establishment of the central drafting office (and the ministries' seeming loss of control over their own bills), the new head of the drafting office insisted it would never change the ministries' bills' substance, but only improve their form.

b. The drafter as *translator* of policy into law, and therefore an active participant in developing the bill's substance.

### 3. Plenary discussion:

a. Why should drafters include both line ministry officials and those who draft the technical form of the final bill?

b. What constitutes the principal function of the law and the legal order in development?

the intersection; a few slow down but do not come to a stop, especially in the small hours of the morning when there is very little traffic on the highway and what there is can be seen for a long distance because of the loom of the cars' headlights. In the daytime during the rush hours, a policeman is on point duty at the intersection, controlling traffic. To what extent does the law explain the behavior of the drivers at the intersection?

(2) One year ago, on January 15, Newstate's new income tax law came into force. Its Income Tax Department came in to existence at the same time. The law requires individuals and companies to self-report their income on forms provided by the Department for that purpose. The forms are due on January 15. By January 20 of the current year, only some 47% of taxpayers appear to have filed forms. To what extent does the law explain their behaviour?

2. Why people behave as they do in the face of a rule of law constitutes a central problematic for the discipline of sociology of law. For drafters, sociology of law becomes a *professional* subject.

a. The Norwegian anthropologist Karl Barth held that the simplest model of society consisted of individuals and collectivities (for example, corporations, ministries) making choices within the limited range of choices permitted by the circumstances, and within the constraints and resources imposed by those circumstances.

b. That theory underpins the model (This Figure 1-1 belongs in Manual, ch.1, p. 17)

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**Fig. 1-1: A MODEL RELATING LAW TO THE BEHAVIOR**

OF ITS

# ADDRESSEES

time- and place-specific  
circumstances

law makers

rule

rule

implementing  
agency (secondary  
role occupants)

sanctions

primary role  
occupant

time- and place-  
specific  
circumstances

time- and place-  
specific  
circumstances

=====

## 3. The model described

- a. Given that, as a principal function, law aims to channel behaviors to solve social problems, does it make sense to say, "It is a good law but badly implemented?"

## 4. The uses of the model as *an inspiration for explanatory hypotheses* (or '*educated guesses*')

### a. Plenary discussion:

(1) Consider the behavior of motorists at the intersection of a side street and a main highway. Based on the model before us, what hypotheses would you put forward as explaining the behaviour of motorists at that intersection?

(2) In general, what categories of factors does the model advise the drafter to consider in explaining problematic behaviors?

## 5. The uses of the model as a guide to drafting new laws.

(1) Consider the behaviour of taxpayers in the face of Newstate's new income tax law. Based on the model, what hypotheses would you put forward to explain the behaviour of the

delinquent taxpayers? What proposals would you put forward to increase the number of reporting taxpayers?

(2) In general, what categories of factors does the model advise the drafter to consider in devising new, *effective* legislation?

(3) The world around, to devise a new law, most commonly drafters copy the law from some other jurisdiction (in the developing world, most commonly the law of a 'developed' country). Does the model teach us anything about the advisability of copying law?

## DAY II: JUSTIFYING A BILL: THE RESEARCH REPORT

Morning session:

### IV. The purpose and structure of the research report: (Prof. Ann Seidman)

Read: **Manual, ch. 4, pp 1-7**

A. The functions of a research report: as a --

1. *justification* for a bill;
2. *guide to decision-making*;
3. *device to inform decision-makers* about the factual basis for the bill

B. Decision-making methodology and the structure of the research report: In general.

1. Various methods by which drafters elsewhere (including both line officials and drafters in the central drafting office) decide on the substance of a bill in light of a given policy, briefly described:

- a. Copying law
- b. Criminalizing behaviour
- c. Compromise between claims and demands of competing interest groups.
- d. Ends-means
- e. Incrementalism
- f. Problem-solving's four steps:
  - (1) Social problem addressed (or 'difficulty')
  - (2) Explanations
  - (3) Solution (the bill)
  - (4) Implementation and monitoring.

C. **Plenary discussion:** To what extent, from time to time, have drafters of Bhutanese legislation used any or some or all of these methodologies for designing new bills?

D. **Small groups:** The Minister asks you to prepare instructions for a drafting team to draft the bill with which your group is concerned. Write those instructions in three ways: As if you followed --

1. an ends-means approach;
2. an incrementalist approach; and
3. a problem-solving approach.

E. The detailed outline of a research report using the problem-solving methodology as the basis for decision-making:

1. The outline for the research report follows the logic of legislative theory: *The explanation of causes of behaviours lays the basis for proposed detailed measures in bill (i.e., solutions)*

Read **Manual**, Chapter IV, pp. 35-39

## V. The Introduction to the research report

### A. The functions of the Introduction

1. To locate the reader in the subject-matter of the research report.
2. In particular, to locate the particular social problem addressed in the general agenda concerning development.

### B. **Small groups:**

1. What general program does the line ministry have to address the sector concerned?
2. Where does the particular social problem at hand fit into that program?
3. Can you justify the selection of your bill for priority in drafting in terms of human rights to development, sustainable human development, effective governance and/or the need for non-arbitrary decision-making?

Afternoon session:

**VI. Describing the difficulty: (Prof. Robert B. Seidman)**

A. The detailed analysis of the difficulty as the foundation of the research report and the bill.

1. 'Unpacking' problematic social behaviors in to their different sets and groupings.

B. **Small groups:** Using the checklist for a research report, write the 'difficulty' section of your research report. (First discuss in group, then assign each group member the task of outlining a part of the 'difficulty' section).

- [1. For the moment, exclude the mini-introduction and mini-conclusions; we will discuss those later]
2. Describe facts relating to:
  - a. the difficulty's superficial manifestation;
  - b. whose and what behaviors seems problematic.
  - c. [Provide the facts, based on whatever knowledge you now have (If time and resources permit, the hypotheses you now formulate on the basis of your current knowledge can guide you in gathering further facts. Otherwise, like most bills, yours will rest on the information you presently have available. Never fear: The line ministries usually have a great deal of information about the problems for which they propose to draft a bill.)]

C. Three preliminary choices:

1. The scope of the bill; avoid 'stuffing' the bill.
2. In problem-solving, the function of the history of the problem and previous Bhutanese attempts to solve it, and its appropriate location in the research report.
3. In problem-solving, the function of foreign law and experience, and its location in the research report;.

**DAY III: EXPLAINING CAUSES OF PROBLEMATIC BEHAVIOURS**

VII. Legislative theory's research agenda for explaining role occupants' behaviours: The ROCCIPI research agenda **Manual, Ch.**

## 4, pp.12-20)

A. The second step of the problem-solving agenda (stated above): 'Formulate explanatory hypotheses (educated guesses) as to causes for role occupants' behaviors (including existing implementation agencies)'

1. The ROCCIPI categories, broadly construed, suggest possible hypotheses to explain the interrelated causes of a role occupant's behaviours in the face of a rule of law.

a. They direct attention at both 'legal' and 'non-legal' causes for behavior.

2. **Small groups:**

a. For your bill, insofar as you now can, use ROCCIPI agenda to complete the section of the outline (**Manual, Box 4-5, pp. 35-9**) relating to explanations of an important primary role occupant's problematic behaviours.

(1) Write out your 'educated guesses' as to causes (be sure to distinguish between **causes** and **conditions**).

(2) Include whatever facts you have that show your 'guesses' appear consistent with the evidence (be sure to assess the available facts; see **Manual, Ch. 6**).

B. Explaining implementing agency behavior.

1. Implementation is central issue relating to use of law for social change: **Manual, Ch. 5**

a. The ROCCIPI categories that help develop hypotheses to explain primary role occupant's behaviors serve the same function with respect to explaining implementing agencies' behaviors (**Manual, Ch. 5-pp. 5-23**).

2. Issues of special importance in explaining implementing agency behaviors

a. Because implementing agencies always comprise complex organizations, an additional model helps to generate hypotheses to explain the *processes* within which agency role occupants decide how to



behave (see **Figure 5-1, Manual, Ch. 5, p. 11**).

b. Whether the agency is primarily *proactive* or *reactive* frequently explains its Capacity to implement the law.

c. The system of *appeals* from agency decision, and the *transparency of its decision-making* frequently determine its *accountability* and therefore the relatively arbitrary character of its decisions.

### 3. Small groups:

- a. Each group member should take 15 minutes to write down the factors (including available supporting facts) that he or she can think of under **one ROCCIPI category** as to causes of officials' problematic behaviours that under existing law seem to hinder effective implementation.
- b. Group as whole should review members' explanations, and, *considering all the facts they know and the interrelated impact of the several causes*, revise and strengthen their explanations for the implementing agency's problematic behaviours (Note points at which getting more facts might prove useful; see **Manual, Ch. 6**).
- c. Assess the available facts' utility for the validity of your combined explanations.
- d. What questions would you ask about foreign law and experience to obtain a better understanding about possible causes of problematic implementation behaviors?

### DAY IV: FORMULATING LEGISLATIVE SOLUTIONS (THE BILL'S DETAILED MEASURES)

VIII. The problem-solving methodology's basic logic teaches that *a bill's detailed provisions should address each cause for the problematic behaviours that constitute the social problem that the bill addresses*. (Review **Manual, Chapters 4,5**).

A. Possible alteernative 'solutions': Proposing detailed

alternative measures for your bills.

1. Where derived:

- a. Foreign law and experience;
- b. professional literature;
- c. Bhutanese experience;
- d. own ideas.

B. Choosing between alternatives

1. List possible alternative solutions (i.e, the detailed measures) for your bill.
2. Review causes for role occupants' problematic behaviours;
3. list measures of for overcoming causes of primary role occupants' behaviours:
  - a. Direct measures (rewards and punishments)
  - b. Roundabout measures (to change factors that cause problematic behaviors;
  - c. Educative measures (to change values and attitudes).
4. List measures to overcome causes of the implementing agency's problematic behaviours.
  - a. Alternative forms of the implementing agency.
    - (1) In general
      - (a) Transitive or intransitive agency;
      - (b) Old or new agency;
      - (c) Proactive or reactive.
    - (2) The form of the agency
      - (a) Implementation through dispute settlement;
      - (b) bureaucratic implementation (usually, a ministry);
      - (c) implementation by a public corporation' or
      - (d) implementation through the private sector

5. Small groups:

- a. Using the ROCCIPI agenda and the complex decision-making model, outline the solution section of your research report with respect to the proposed implementing agency's input-, conversion-, or feedback processes.
  - b. Testing your proposed solution:
    - (1) Do proposed measures seem to address the identified causes? Will they likely induce the prescribed behaviors? ('ROCCIPI in reverse')
    - (2) What provisions concerning the implementing agency seem likely to ensure more effective implementation?
    - (3) What questions would you ask about foreign law and experience as to whether your proposed measures seem likely to work?
  - c. Outline the sections of the research report concerning the proposed solution (see Outline in the *Manual*)
- C. Make a social cost/benefit analysis of all the alternative possible solutions (measures addressed to primary role occupants and to implementing agencies) as a basis for selecting your group's preferred solution (see **Manual, Ch. 4, pp. 20-7**)
- 1. Small groups:** Outline socio-economic costs and benefits of your bill's proposed measures:
- a. List monetary costs and benefits to:
    - (1) Stakeholders (that is, everyone affected by the bill)
    - (2) Government
  2. List social consequences for:
    - a. Sustainable development
    - b. Vulnerable groups (women, children, aged, poor, ethnic minorities);
    - c. Inchoate values (human rights, environment, good governance).
- D. Devices to avoid arbitrary decision-making and corrupt

behaviours

1. **Small groups:**

a. Assess proposed implementing agency's criteria and procedures in terms of the following:

(1) Do they sufficiently limit officials' discretion, and provide transparency, and accountability?

(2) do they ensure that those affected (especially historically-disadvantaged groups) participate as much as possible in input-, feedback- and conversion-processes?

b. What questions might you ask about foreign law and experience to learn of possible ways to improve implementing agency's criteria and procedures for decision-making?

c. To reduce dangers of arbitrary decision-making and corrupt behaviours, what would the group recommend about possible changes in the research report's solutions section

**DAY V: SOCIAL SCIENCE RESEARCH METHODS FOR DRAFTERS**

Read Manual, Ch. 6

IX. To justify the claim that your bill's proposed measures rest on reason **informed by experience**, you must be sure that your hypotheses (educated guesses) as to the nature and causes of the difficulty and the problematic behaviors that comprise it prove **consistent with sufficient evidence** to make it likely that your proposed solutions, designed to overcome those causes, will lead to the desired social consequences

**A. Small groups:**

1. Identify the kinds of facts, and where you obtained them, that you have used in your research report to:

a. To describe the social problem and the behaviours that comprise it;

b. To support your claims as to the causes of the problematic behaviours;

c. To weigh the socio-economic costs and benefits of the proposed solution.

2. To what extent did those who gathered those facts use quantitative methods (e.g., representative sample surveys using questionnaires) as compared to qualitative (participant observation, open-ended interviews, focus groups) methods?

3. Assess the extent to which you think your group can justifiably use those facts to claim your analysis proves 'consistent' with the available evidence?

4. If you had time, what further facts would you want to gather, and what methods might you use to gather them?

#### DAY VI: WRITING OUT THE RESEARCH REPORT

- X. The form of a competent research report (see *Manual*, ch. 7)
  - A. Accessible language
  - B. Signposts
    - 1. Summary introductory paragraph
    - 2. Description of the problem-solving methodology (frequently combined with the summary introductory paragraph).
    - 3. Conclusory paragraph to the research report
    - 4. Mini-introductions
    - 5. Mini-conclusions
    - 6. Connectives
  - C. Short sentences
    - 1. Correct:
      - a. "Implicitly adopting the truism that 'Everyone learns from the facts,' a drafter's research report must provide the relevant evidence to justify the bill's substantive provisions, although in reality, readers do not learn merely from propositions stating facts, because by themselves, these propositions stand mute, for they can teach only if explicitly structured by logic."

D. Most important concept at end of the sentence

1. Correct:

- a. "The disposition of industrial wastes causes underground water pollution in urban and peri-urban areas, as a great deal of evidence has shown."
- b. "Bank officials lend funds to enterprises without sufficient proof of the enterprises' financial viability too often."
- c. 'Ministers seldom, if ever, hold hearings involving all the stakeholders, nor do they often request notice and comment, prior to promulgating subsidiary legislation.'

E. Keep together subject and verb, the parts of a compound verb, and verb and object

1. Correct:

- a. "Smallholder farmers do not use, so far as the evidence suggests, drainage ditches to catch the run-off water."
- b. "Many school leavers do not in Bhutan want to return to work in the rural areas."

F. Use as few 'glue words' as possible.

1. Correct:

- a. 'The solution that the bill adopts requires that wastes, whether or not they be industrial or originated by farmers, shall be disposed of in ways to be determined by the Environmental Protection Agency, in rules that shall be promulgated by that Agency.'
- b. 'An attorney who defends a client under the existing Legal Aid Act too often finds it in his interest to use every effort to persuade his client, regardless of whether he or she is innocent, to plead guilty in order to obtain his fee with the least possible time and effort.'

G. Write with nouns and verbs, not adjectives and adverbs.

1. Correct:

- a. 'An important reason why local government councillors do not adequately serve their constituents is that they do not really have the necessary experience or knowledge as to how to meet the demands of their jobs.'
- b. 'A very great many of China's farmers use extremely excessive amounts of various fertilizers, which inevitably find their way into deep underground water courses.'

H. Avoid 'throat-clearing' expressions.

1. Correct:

- a. 'It is widely recognized that the possibility of concealing financial transactions provides officials with many opportunities to engage in corrupt activities.'
- b. 'There are many fast flowing rivers in Bhutan.'

I. Avoid the passsive voice.

1. Correct:

- a. 'The causes of conflict between the national and local governments are frequently found in the ambiguities of existing legislation.'
- b. 'A research report should be written without using the passive voice.'
- c.

J. **Small groups:**

1. Using the information written out in the previous days, members to write out the following 'signposts' to help readers to understand the logic of your research report:

2. Introduction, including:

- a. 'grabber paragraph' to attract readers' attention;
- b. a short paragraph stating the social problem your bill addresses, and the principal thrust of your bill's solution;
- c. background information about the difficulty,

perhaps including an historical section describing the history of the difficulty as it has appeared in your country, and the efforts made to deal with it;

d. a paragraph describing other bills that will likely comprise a legislative programme for the relevant sector, showing where your bill fits in, and explaining your bill's priority;

e. a brief description of the problem-solving methodology, showing how the remaining parts of the report follow the problem-solving approach.

3. Connectives between major sections of the report, i.e., a sentence at the end of each major part to explain how it lays the basis for the next part; and an introduction to each part to tell reader how it fits into the logic of the report, and outlining the main points it will make.

4. A general conclusion, including a summary of the overall findings of each part and a review of your bill's main provisions and how they will likely help to overcome the causes of the existing social problem. (If, after careful assessment, your group thinks further factual information seems necessary to justify your proposed bill, say so.)

5. Identify main points at which your report requires references as to sources of information cited, and write out the references according to a standard form.

Note: Over the weekend, try to pull together all the parts of your research report into a completed draft.

## DAY VII: STRUCTURING YOUR BILL

**Read Manual, Ch. 8.**

XI. The problem of a bill's form, in general.

A. Criteria for decisions about form determined by the drafter's role.

### 1. Plenary discussion:

a. If a drafter serves primarily as a *communicator* of laws with the principal function of *declaring rights and duties*, what should be the criteria for



the performance of the drafter's role?

b. If the drafter serves primarily as a *translator of policy* into laws with the principal function of *inducing prescribed behaviors*, what should those criteria be?

c. In determining the appropriate criteria for the drafter's role, does it matter whether a bill's form and content constitute a unity, or whether form and content constitute separate elements of a bill?

B. Grouping and ordering: In general

1. The parts of a bill

a. The section as the bill's building block.

2. Grouping and ordering defined

3. **Plenary discussion:** Possible principles of grouping and ordering; to which ought a drafter adhere?

a. The 'golden thread';

b. 'logic';

c. utility to a bill's prospective users.

C. A default system for grouping and ordering: LAW, IMPLEMENTATION, SANCTIONS, FUNDING

D. **Small groups:**

1. Based on your research report's suggestions about what your bill will contain, discuss the extent to which the default outline (see **Manual, Ch. 8, pp. 18-27**) seems appropriate for your bill.

2. Each member of the group do a first draft of one part of the bill (general, law, implementation, sanctions, appropriations, miscellaneous). Within each part, be sure to think about the logical ordering of the sections.

#### DAY VIII: WRITING THE SENTENCES

**Read Manual, Chs. 9, 10**

XII. Almost all legislative sentences prescribe *who does what*, ensuring clarity and avoiding ambiguity

A. Why do almost all legislative sentences prescribe *who does what*?

B. Guides to specifying the 'who'

1. General criteria:

- a. Who acts?
- b. a legal person;
- c. distinguish between *imposing an obligation to act*, describing a *status relationship*, and the indication of *future action* without involving an obligation to act.

2. Use your own language's resources for specifying who does what accurately.

a. For example, in English, avoid the passive voice; use the singular rather than the plural; etc.

b. What linguistic rules might help in specifying the Who in your language?

C. Guides to specifying the 'what'.

1. General criteria

a. Do not include argumentative or descriptive material.

b. Draft in terms of behaviors, not rights and duties.

c. Distinguish between imposing a duty to act, and granting a discretionary power

d. Distinguishing between the case, the condition, and the exception. (In English, the rule against the proviso).

2. What linguistic rules might help in specifying the What in your language?

D. **Small groups:**

1. Each group member should write the legislative sentences for the sections that make up one part of the bill, specifying *who does what* clearly and unambiguously.

2. The group should critically assess and revise the sentences that comprise each section of the bill.

**DAY IX: DRAFTING WITHIN CONSTRAINTS, AIDS TO INTERPRETATION,  
FORMAL MATTERS AND AMENDMENTS**

*Read Manual, Ch. 11*

XIII. While drafters try to meet their 'clients' demands, they do so within constitutional and other constraints

**Small groups:** Discuss the specific constraints that you, as a drafting team, must consider in drafting your bill: The constitution, ministry instructions, the Interpretation Act, other constraints.

XIV. Internal aids to interpretation

*Read Manual, Ch. 12*

A. The problem of interpretation

1. A rule's core meaning and penumbra
2. Selected devices for guiding a judge's discretion in deciding penumbral cases.
  - a. Definitional sections
  - b. General purposes sections
  - c. Preamble
  - d. Legislative history (including the research report)
3. Small groups:
  - a. Identify all the possible aids you should include in your bill to facilitate interpretation.
  - b. Each member of the group to write one of the aids to interpretation which the group has decided seems likely to prove useful to ensure appropriate interpretation of your bill.

XV. Formal matters and amendments: Ensuring coherence and consistency

*Read Manual, Ch. 13*

**A. Small group:**

1. Find out whether Bhutan's legislation has been consolidated, and if so where your bill should fit into that system.
2. Identify other bills that may require amendment as a result of your bill, and, considering possible ways, justify the way you plan to make those amendments.
3. How will you avoid confusion as to when, after its enactment, your bill goes into force?
4. Will your bill contain any retroactive provisions? If so, explain why and how you will ensure their proper enforcement.
5. Will your bill contain any savings provisions? If so, draft them.

**DAYS X-XII: CRITIQUE SESSIONS**

Each group, in turn, will submit its bill and research report to the entire group for a systematic, constructive critique as to substance and form. Copies of the bill and report, no matter how rough, should be provided to all members of the plenary session the day before the scheduled critique

**DAY XII: FINAL EVALUATION OF WORKSHOP**

August 18, 1999

OUTLINE FOR TWO WEEK WORKSHOP  
Thimphu, 1999

**DAY I: TRANSLATING POLICY INTO EFFECTIVE LAW**

Morning session:

**I. 10:00 - 12:00 Purpose and structure of workshop: (Prof. Robert B. Seidman)**

**A. Objectives:**

1. draft bills and research reports
2. learn legislative theory and methodology

**B. Teaching method: learning-by-doing in small groups**

1. discuss issues of theory and practice
2. prepare bills and reports

**C. Plenary discussion:** "Nobody fixes something unless they think it is broken. Legislation always addresses a social problem." Discuss.

**1. Small groups: Discuss: (45 minutes)**

- a. What do you understand by 'social problem'?
- b. Describe how the social problem that your group's bill and research report will address presently appears to you?

**II. In aid of social, political and economic development, what constitutes the drafter's task?**

**A. Introduction: Plenary discussion: (Prof. Robert Martineau)**

1. In Bhutan today, who writes the final draft of most bills? How do they go about their task?
2. In connection with proposed legislation, what do most civil servants in the line ministries consider as their primary task?
3. This workshop adopts the approach that drafters should include both **ministry officials** -- who know the facts about the social problems bills aim to solve --

and **legally-trained drafters** -- who know legislative drafting techniques. These must work together to **ensure the unity of the bill's form and substance in translating policy into effectively implementable law.**

*Read Manual, Chapters 1-3*

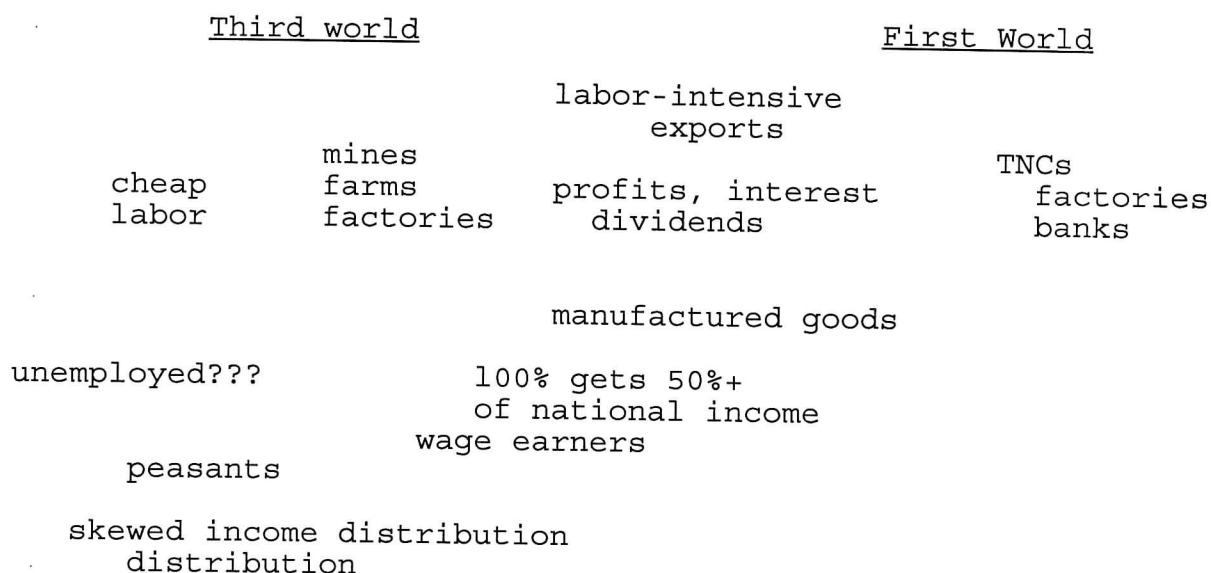
**B. Development in the larger context; development and institutions: Four categories of priority issues for development. (Prof. Ann Seidman)**

1. *Economic development*

a. Consider the model in Fig. 1

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**Fig. 1: Model of Third World Dependency**



(belongs in Manual, Chapter 3, p. 9).

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b. Considered as a model of resource allocation, does the model generally describe Bhutan's circumstances? What special Bhutanese circumstances exist that require some modification of the model?

c. Can government do anything *directly* about resource allocations?

d. 'The model of resource allocation and dependency also constitutes a model of

*institutions and their relationships.'* Discuss.

e. 'The difference between one society and another, or between a less developed and a more developed society, lies in their institutional differences.' Discuss.

2. 'Efficiency' and 'equity': The vocabulary of human rights in development as a movement to consider not only efficiency but also distributive consequences of development initiatives.

3. 'Effective governance': Ineffective development programs as social problems.

a. Government has earlier addressed almost every social problem that one can identify. The 'social problem' as it appears to the drafters almost invariably includes the failure of past efforts at solution.

4. 'Good governance': Arbitrary decision-making as social problems. In this connection, the 'social problem' as it appears almost everywhere includes repeated arbitrary decision-making -- especially, corruption and the overhanging threat of corruption.

#### 5. Small groups

a. Give one example in Bhutan of each of these social problems.

Afternoon session:

#### C. Institutions and behavior: Plenary discussion. (Professor Robert Seidman)

1. What do you understand by the word 'institution'? Give some examples.

2. What do you understand by the word 'development'? Give some examples of a more developed and of a developing society, and describe the key differences

3. Consider an institution as *repetitive social behaviors*? In that interpretation, is the judiciary an institution? the legislature Why? Is your department or ministry an institution? Why? Is the family an institution? Is this course an institution?

4. 'The processes of development require *institutional changes* to resolve the poverty and dependency that presently characterize the poor nations, and their ineffective and poor governance.' Discuss.

5. 'The processes of development require widespread changes in repetitive patterns of behavior.' Discuss.

D. Government, law and institutional change.

1. **Plenary discussion:** The many functions of law.

a. Law has many functions, for example: Dispute settlement, the authoritative declaration of rights and duties, supporting the power and privilege of the ruling class, articulating deeply held social values, channelling various social behaviors into desired ways.

b. For purposes of social, political and economic development, which of these many functions of law seem to you the most important? Why?

E. Social problems consist of problematic sets of behaviors, that is, of problematic *institutions*.

1. **Plenary discussion:**

a. Consider the social problem that you have identified as the target of your proposed bill. Did you initially describe it as a resource allocation or as a behavioural problem? Can you describe it as a problem in resource allocation?

b. Describe it as a behavioral problem.

c. Can one describe every social problem as a behavioral problem?

F. The legal order as government's principal tool for social change, i.e., for addressing social problems.

1. **Plenary discussion:**

a. Is it true that Government invariably translates a seriously intended, publicly avowed policies as a law? Any exceptions?

b. Why does government do that? Why not merely announce the policy?



G. The role of the drafters.

1. In this workshop, the word 'drafters' refers to both line ministry officials concerned with getting legislation drafted, and the lawyers who write the technically-finished draft bills. Those two groups should join in producing a finished bill for presentation to the legislature. Together, they constitute the *drafters*.

2. Two views of the drafter's role:

a. The drafter as *communicator of someone else's policy*, and therefore as disinterested in the bill's substance.

(1) This view of drafter long inculcated by British tradition.

(a) Practically all drafting courses focus on training drafters to draft unambiguous, well-written bills to communicate law to its addressees.

(b) That reflects an all but universal myth that drafters have nothing to do with the *substance* of legislation, but only its *form*.

(c) Myth's history: In 19th Century England, in the face of ministries' objections to the establishment of the central drafting office (and the ministries' seeming loss of control over their own bills), the new head of the drafting office insisted it would never change the ministries' bills' substance, but only improve their form.

b. The drafter as *translator* of policy into law, and therefore an active participant in developing the bill's substance.

3. Plenary discussion:

a. Why should drafters include both line ministry officials and those who draft the technical form of the final bill?

b. What constitutes the principal function of the law and the legal order in development?